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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

EDWARD GLUKLICK
AND
GLUCK CONSTRUCTION COMPANY,
Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A COMPLAINT SHOULD BE DISMISSED PURSUANT TO FRCP 4(j) IF THE SUMMONSES ISSUED IN CONNECTION THEREWITH ARE NOT SERVED UPON THE DEFENDANTS WITHIN 120 DAYS FROM THE DATE OF THEIR ISSUANCE?

Defendants-Petitioners answer "yes".

II.

WHETHER A DEFENDANT WAIVES ITS RIGHT TO CONTEST THE VALIDITY OF AN EXPIRED SUMMONS MERELY BY ENTERING INTO A STIPULATION ACKNOWLEDGING SERVICE WHERE, AFTER SUCH ACKNOWLEDGEMENT, DEFENDANT ACTUALLY RECEIVES A COPY OF THE SUMMONS FROM PLAINTIFF, DISCOVERS IT HAS EXPIRED AND THEN IN ITS FIRST RESPONSIVE PLEADING MOVES FOR DISMISSAL?

Defendants-Petitioners answer "no".

III.

WHETHER A DEFENDANT'S FIFTH AMENDMENT DUE PROCESS RIGHTS ARE VIOLATED WHERE THE UNITED STATES OF AMERICA, AS PLAINTIFF, IMPROPERLY CAUSES A DEFAULT TO BE ENTERED, INDUCES A DEFENDANT TO ENTER INTO A STIPULATION TO ACCEPT SERVICE OF A SUMMONS AND COMPLAINT, FAILS TO DISCLOSE TO DEFENDANT THAT THE SUMMONS HAS EXPIRED AND MISREPRESENTS A FACT BEARING UPON THE PROBABILITY FOR SUCCESS IN SETTING ASIDE THE DEFAULT?

Defendants-Petitioners answer "yes".

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No. _____

In The

Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

EDWARD GLUKLICK
AND
GLUCK CONSTRUCTION COMPANY,
Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI

Edward Gluklick and Gluck Construction Company, by and through their counsel, Jerome B. Greenbaum, of Greenbaum, Greenbaum and Gold, Professional Corporation, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-captioned matter.

OPINIONS BELOW

Although recommended for full text publication, the opinion of the Court of Appeals (App A, *infra* at A-1) is not reported as of this printing. The opinion of the District Court (App C, *infra* at C-1) is not reported.

JURISDICTION

The judgment of the Court of Appeals (App B, *infra* at B-1) was entered September 18, 1986. A petition for rehearing was denied on October 28, 1986 (App F, *infra*

at F-1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. FRCP 4(1)

> "(j) SUMMONS: TIME LIMIT FOR SERVICE. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule."

2. FRCP 4(c)(2)(C)(ii)

> "(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule —
>
> * * *
>
> (ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of

this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3)."

3. FRCP 6(b)

"ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done when the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them."

4. FRCP 12(b)

"HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue,

(4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56."

5. U.S. Constitution, Fifth Amendment:

"AMENDMENT [V] [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against him-

self, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

6. 28 U.S.C. 1254(1) (App G, *infra* at G-1)

7. 28 U.S.C. 1345 (App H, *infra* at H-1)

8. 31 U.S.C. 231-235, replaced by 31 U.S.C. 3729-3731 (App I, *infra* at I-1)

STATEMENT OF THE CASE

Plaintiff, United States of America, commenced a civil action in the United States District Court for the Eastern District of Michigan, Southern Division, against the Defendants Edward Gluklick and Gluck Construction Company alleging, among other things, a claim under the False Claims Act, 31 U.S.C. 231-235. The District Court's jurisdiction was based on 28 U.S.C. 1345. Its Complaint was filed with the Clerk of the Court on December 16, 1983, with summonses being issued at the same time. Plaintiff attempted service via certified mail pursuant to FRCP 4(c)(2)(C)(ii) on December 16, 1983 and again on January 17, 1984. The requested return receipts indicated the recipient to have been Shirley Gluklick on each occasion. Shirley Gluklick is not a party to this action nor an agent of a party. Neither Defendant acknowledged receipt of, nor responded in any fashion to, the summonses and complaints. Thereafter, notwithstanding the lack of service upon Defendants, a Clerk's Entry of Default was sought by Plaintiff (App J, *infra* at J-1) and entered on June 4, 1984. Service of the Default was eventually made upon the Defendants.

After Defendants were served with the Default, they contacted an attorney. Defendants' attorney then contacted the government's attorney and advised her of the service irregularities; in other words, that neither Defendant had been served and that Shirley Gluklick was not a party nor an agent of a party. At that time, based upon certain representations of the Assistant United States Attorney, it was agreed that the government would set aside the Default in exchange for Defendants' acceptance of service so as to prevent further delay and to avoid the possibility that the District Judge might refuse to set aside the Default on Defendants' motion and the expense associated with that effort.

After Defendants stipulated to accept service, their counsel received the summonses and complaints. Upon receipt of the actual summonses and complaints, the Defendants learned for the first time that the summonses issued in this matter had expired; that is, more than 120 days had elapsed between the time the summonses were issued and the time when the summonses were ultimately served. A motion to dismiss was immediately prepared and filed pursuant to FRCP 12(b), based upon FRCP 4(j).

By order entered November 2, 1984, the District Court denied Defendants' motion (App E, *infra* at E-1). Next, Defendants appealed to the United States Court of Appeals for the Sixth Circuit which, on September 18, 1986, affirmed the District Court's denial of Defendants' motion to dismiss. Defendants filed a petition for rehearing which was denied on October 28, 1986. Defendants now file this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

A COMPLAINT SHOULD BE DISMISSED PURSUANT TO FRCP 4(j) IF THE SUMMONSES ISSUED IN CONNECTION THEREWITH ARE NOT SERVED UPON THE DEFENDANTS WITHIN 120 DAYS FROM THE DATE OF THEIR ISSUANCE.

Service of the complaint and summonses upon Defendants pursuant to the District Court's order of July 18, 1984 (App D, *infra* at D-1), some 215 days after the summonses were first issued, is ineffective in light of FRCP 4(j) which provides:

> "SUMMONS: Time Limit For Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action *shall* be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule." (Emphasis added).

Since the action was filed December 16, 1983, and the summonses were issued contemporaneously therewith, the expiration of the summonses' life on or about April 14, 1984 rendered the subsequent service thereof invalid. Because of the newly enacted provisions of FRCP 4, this Court should decide and settle the important questions involving the relationship among its several provisions, and reverse an erroneous ruling of the Court of Appeals which conflicts with prior rulings of this Court.

II.

A DEFENDANT DOES NOT WAIVE ITS RIGHT TO CONTEST THE VALIDITY OF AN EXPIRED SUMMONS MERELY BY STIPULATING TO ACKNOWLEDGE SERVICE WHERE, AFTER SUCH ACKNOWLEDGEMENT, DEFENDANT RECEIVES THE SUMMONS, DISCOVERS ITS EXPIRATION AND MOVES FOR DISMISSAL IN HIS FIRST RESPONSIVE PLEADING.

The District Court concluded that the Defendants' stipulated acceptance of service waived any right to raise the issue of the summonses' invalidity. The stipulation upon which the District Court relied provided that the Defendants merely accept service. By entering into such an agreement, the Defendants maintain that they did nothing more than what is permissibly allowed pursuant to FRCP 4(c)(2)(C)(ii), in other words, they acknowledged the summonses' receipt. By agreeing to accept service in this manner, the Defendants were able to avoid the expense of a process server and the uncertainty of whether the District Judge would set aside the Default. Upon their receipt, the Defendants first discovered the invalidity of the summonses, and in their first responsive pleading, moved for dismissal. The District Court ruled that this was too late.

It is hard to imagine how much earlier one is expected to proceed. Since the defect can only be realistically determined by a review of the summons itself, the Court's ruling, and the Appellate Court's affirmance thereof, appears to say that one who "accepts" service from a process server or "accepts" service by acknowledgment or stipulation, of an expired summons, has waived his or her right to object to its validity pursuant to FRCP 4(j). If the Court *doesn't* dismiss the action *sua sponte*, and the defendant *can't* successfully move for a

dismissal, FRCP 4(j) is, in effect, a nullity, unless, of course, the plaintiff wishes to raise it.

The Defendants maintain that the District and Appellate Courts erred in this regard and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In the case of *Butterworth* v *Hill*, 114 US 128, 5 S Ct 796, 29 L Ed 119 (1885), which the Court of Appeals failed to distinguish, or even discuss, the defendant was a commissioner of patents. The plaintiff filed his complaint in the State of Vermont seeking to have the denial of his patent application overturned. The defendant was served in the District of Columbia, and he accepted and acknowledged service in writing. In his endorsement of the writ, the defendant stated:

> "I hereby accept service of the within subpoena, to have the same effect as if duly served on me by a proper officer, and I do hereby acknowledge the receipt of a copy thereof."

The United States Circuit Court for the District of Vermont concluded that the defendant's acceptance of service waived any and all jurisdictional questions and proceeded to enter a judgment in favor of the plaintiff when the defendant failed to respond further. The Supreme Court reversed. In its decision, this Court held:

> "The fair meaning of the endorsement on the writ is that the commissioner admits the service with the same effect it would have if made by an officer in the District of Columbia. No appearance is thereby entered in the cause. Service of the subpoena in the District is acknowledged, but nothing more . . . . The Act of Congress exempts a defendant from suit in any district of which he is not an inhabitant, or in which he is not found

> at the time of the service of the writ. It is an exemption which he may waive, but unless waived, he need not answer and will not be bound by anything which may be done against him in his absence." (Pages 132-133).

Though one may waive an objection to personal jurisdiction, it is not accomplished by a mere acknowledgment of service. *Butterworth* v *Hill, supra; Bolton* v *Keys,* 38 Ga App 473, 144 SE 406 (1928); *Varn* v *Chapman,* 137 Ga 300, 73 SE 507 (1912). Nor does an acknowledgment or acceptance of service constitute a waiver of the defense of improper venue. *Camp* v *Gress,* 250 US 308, 39 S Ct 478, 63 L Ed 997 (1918); *United States* v *Lowry,* 43 F 449 (1890, CC Mich).

The Defendants' acknowledgment in this matter did not constitute a waiver of the defense of lack of personal jurisdiction. The District Court's ruling, which resulted in the spontaneous resurrection of otherwise invalid summonses, is in error because service of invalid summonses is no service at all. FRCP 4(j) can only be implemented when one has notice of the lapse of the life of a summons. The mandatory action required therein is the only effective means by which the rule can be enforced and given effect.

The Court of Appeals failed to distinguish or even discuss *Burks* v *Griffith,* 100 RD 491 (ND NY 1984). Although *Burks* is not binding authority on the Court of Appeals, its reasoning should have been at least instructive and persuasive precedent since it involves the recently enacted FRCP 4(j). In *Burks,* law enforcement officials had conducted a search of plaintiff's home. With two days left before the Statute of Limitations was to expire, plaintiff filed suit claiming a violation of his constitutional rights. Defendant brought a motion to dismiss under FRCP 4(j) because plaintiff had failed to serve

defendant within the 120 day period. Plaintiff offered no reason for his failure to timely serve the defendants, but did indicate that all of the defendants ultimately had been served. The Court held that 4(j) requires dismissal regardless of whether or not any defendant had moved to dismiss for lack of timely service of process. The Court noted that after the dismissal, further action was barred by the Statute of Limitations. The Court said that the result could have been avoided had plaintiff requested and received an extension of time for service.

Rule 4(j) provides that a dismissal of the action may be prevented if the offending party can show good cause why service was not completed within the time frame permitted. Or, one might use FRCP 6(b) to either enlarge the 120 day period or, if the guilty party's failure to effect service was the result of excusable neglect, the Court would have the authority to render the service otherwise effective. The District Court ruled, however, in the case at bar, that such a showing was not necessitated, when it held that the Defendants' acceptance of service waived their right to question the validity of the summonses altogether.

The District and Appellate Courts formed a conclusion supported neither by the record nor logic. The last line of the Court of Appeals' opinion says that Defendants should have been aware of the defect in service. They were. But they could not have been *aware* of the expiration of the summons when they agreed to accept service and file a responsive pleading. That ignorance, together with the misrepresentation of the Assistant United States Attorney, renders their agreement to accept service void.

There has been no waiver of the right to contest the validity of the summonses. As indicated above, the Appellate Court failed to distinguish or even discuss

Butterworth v *Hill, supra.* In that case, this Court held that there was no waiver of personal jurisdiction upon mere acknowledgment of service.

In support of its ruling that Defendants waived their rights to contest personal jurisdiction, the Appellate Court cited *Meetings & Expositions, Inc.* v *Tandy Corp.*, 490 F2d 714 (2d Cir 1974). In that case, defendant brought a motion to dismiss for lack of personal jurisdiction, but before the decision was rendered, the parties entered into a stipulation and agreement that went to the *merits* of the underlying case, providing that upon the failure by plaintiff to comply with the agreement, the clerk, upon affidavit of defendant, was to enter a default against plaintiff for a certain sum, and upon full performance of the agreement the parties were to file with the court a stipulation dismissing the action with prejudice. When plaintiff submitted an order for defendant to show cause why it should not be held in contempt for failure to comply with the agreement, the district judge dismissed the action for lack of personal jurisdiction. On appeal, it was held that the judge had erred because the stipulation and agreement was a consent to the exercise of the court's power to compel compliance. Here, unlike that case, Defendants did not substantively benefit from the power of the Court to compel compliance with a stipulation and agreement going to the merits of the case.

A. Waiver Must Be Supported By Consideration.

The parties and the Appellate Court acknowledged that Defendants were never personally served before the clerk's entry of Default nor before the stipulation was entered into. Thus, the Default was improperly entered. A stipulation is not unlike any other contract, and must

be supported by consideration. *Bank of United States* v *Bank of Georgia*, 10 Wheat (US) 333, 6 L Ed 334 (1825).

> "[A] waiver, without some new consideration, upon a sudden disclosure, and under a mistake of legal rights, ought not to be conclusive to the prejudice of the party, where, upon further reflection, he refuses to acquiesce in it." *Bank of United States*, p. 357.

Since the Default was both improperly applied for and entered and the summons had expired, Plaintiff failed to supply consideration for the stipulation.

B. By Definition, There Was No Waiver.

The Defendants did not waive their right to contest personal jurisdiction. Waiver is defined as the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v *Zerbst*, 304 US 458, 464, 58 S Ct 1019, 82 L Ed 1461 (1937).

> "No man can be bound by a waiver of his rights unless such waiver is made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights and intends to waive them must plainly appear. Ignorance of a material fact negatives waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of fact." 28 Am Jur 2d, *Estoppel and Waiver*, § 158.

Defendants did not intentionally waive a *known* right, since at the time the stipulation was entered into, Defendants had not yet received the summonses and, thus, could not have known that the summonses had expired.

III.

A DEFENDANT'S FIFTH AMENDMENT DUE PROCESS RIGHTS ARE VIOLATED WHEN THE UNITED STATES OF AMERICA, AS PLAINTIFF, IMPROPERLY CAUSES A DEFAULT TO BE ENTERED, INDUCES DEFENDANT TO ENTER INTO A STIPULATION TO ACCEPT SERVICE OF A SUMMONS AND COMPLAINT, FAILS TO DISCLOSE TO DEFENDANT THAT THE SUMMONS HAS EXPIRED AND MISREPRESENTS A FACT BEARING UPON THE PROBABILITY FOR SUCCESS OF A MOTION TO SET ASIDE THE DEFAULT.

A. The Federal Government's Actions Violated Rights Guaranteed To The Defendants Under The Due Process Clause Of The Fifth Amendment To The U.S. Constitution.

The Fifth Amendment applies here, firstly, because it is the federal government which is suing the Defendants and which is acting through its agents, the U.S. Attorney's office. Secondly, the Defendants have a substantial property interest involved, to-wit: their claim of interest in $68,000.00 plus costs and fees incurred as a result of defending the government's suit.

Plaintiff acted improperly in several respects which, if not remedied, will cause Defendants to be deprived of their property without due process of law.

1) Plaintiff made application for a Default to be entered against Defendants knowing that service of process had not been effected;

2) The Assistant United States Attorney, representing Plaintiff, induced Defendants to accept service
   a) while only Plaintiff knew that the summons had expired;

b) failing to disclose to Defendants or their attorney that the summonses had expired;

c) falsely representing to Defendants' counsel that "[Mr. Gluklick had] signed the certified mail receipt" for the envelope containing the summonses and complaints;[1]

d) stating that "I do think the judge would be angered by your client's recalcitrance when we ultimately bring the matter of costs before him",[1] implying the possibility of prejudice against the Defendants by the trier of the facts, both with respect to the outcome of a motion to dismiss and the substantive issues in the cause.

World-Wide Volkswagen Corp. v *Woodson*, 444 US 286, 100 S Ct 559, 62 L Ed 2d 490 (1980) applies here in principle. In that case, as part of the test to determine when a court has personal jurisdiction over a defendant, this Court applied the Due Process clause as protection against inconvenient litigation. Just as it may be unfair to require a defendant to defend in an inconvenient forum so as to violate due process, likewise, it offends traditional notions of fair play and substantial justice that the government in this case fraudulently induced Defendants to accept service while Defendants had a valid defense to service because the summonses had

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[1] "On June 15, 1984, counsel for the Plaintiff wrote to counsel for Defendants:

> 'Pursuant to our conversation, I have checked my file which indicates that your client did not sign the Rule 4 acknowledgment of service, despite the fact that he signed the certified mail receipt. If your client will not acknowledge, I will arrange for personal service by the Marshall before taking a default. However, I do think the judge would be angered by your client's recalcitrance when we ultimately bring the matter of costs before him.'" (App A, *infra* at A-2).

expired. The government was the only party to the stipulation which was aware of the defective summonses, and the government not only concealed that information from the Defendants, it misrepresented facts bearing upon the prospects of success in a proposed motion to set aside the Default.

B. The Federal Government Should Be Estopped By Its Actions.

Plaintiff allowed its summonses to expire prior to effecting service of process within the 120 day period allowed by law. Instead of moving to enlarge the time period pursuant to FRCP 6(b), it engaged in the conduct set forth above, thus inducing Defendants to act in a manner prejudicial to their interests, and in which they would not have acted had the true facts been disclosed and had the government not misrepresented conditions to the District Court clerk and to Defendants' counsel concerning service of process.

> "[H]e who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." *Dickerson* v *Colgrove*, 100 US 578, 580, 25 L Ed 618 (1879).

Thus, in the present case, Plaintiff should be estopped from claiming that Defendants waived their right to contest the validity of the summonses.

CONCLUSION

The Defendants raised their objection to the validity of the summonses at the *earliest* possible moment. The District Court and the Court of Appeals said that this was too late. Allowing such rulings to stand will have a serious and unfortunate impact on federal civil procedure. Further, Defendants should not be deprived of their property without the due process of law and standards of fair play imposed upon the government of the United States. For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: January 22, 1986

APPENDICES

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APPENDIX A

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed September 18, 1986)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD GLUKLICK, et al., Defendants-Appellants — ON APPEAL from the United States District Court for the Eastern District of Michigan; No. 85-1687)

Before: KEITH and NELSON, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge.

Defendants Edward Gluklick[1] and Gluck Construction company appeal from an order of the district court granting judgment in favor of plaintiff, the United States, on its complaint brought pursuant to the False Claims Act. On appeal, defendants challenge service as defective. For the reasons that follow, we affirm.

I.

On December 16, 1983, the United States filed a complaint against Defendants Edward Gluklick and Gluck

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[1] The complaint and subsequent filings made by the United States have consistently spelled the defendant's name, "Glucklick." However, the answer, the notice of appeal, and other filings made by the defendants indicate that the proper spelling is "Gluklick."

Construction Company under the False claims Act, 31 U.S.C. § 231-235 and 28 U.S.C. § 1345. The complaint alleged that defendants were awarded a $101,362 contract by the Veterans Administration (VA) and submitted an invoice for $68,000 for the first progress payment. The complaint also alleged that the VA disbursed a $68,000 check which defedants reported that they never received. The VA disbursed a second check, and then defendants allegedly cashed both checks although they had been paid the full amount of the contract. The United States alleged claims for violation of the False Claims Act (Count I), fraud (Count II), unjust enrichment (Count III), and breach of contract (Count IV). [2]

On June 4, 1984, the United States requested an entry of default judgment and such was entered on that date. On June 15, 1984, counsel for the plaintiff wrote to counsel for defendants:

> Pursuant to our conversation, I have checked my file which indicates that your client did not sign the Rule 4 acknowledgment of service, despite the fact that he signed the certified mail receipt. If your client will not acknowledge, I will arrange for personal service by the Marshal before taking a default. However, I do think the judge would be angered by your client's recalcitrance when we ultimately bring the matter of costs before him.

On June 25, 1984, counsel for defendants replied that defendants would receive service contingent upon the setting aside of the default previously entered.

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[2] On January 17, 1984, an amended complaint was filed asserting a claim pursuant to 31 U.S.C. § 3729 *et seq.*, the 1982 revised codification of the False Claims Act.

On July 18, 1984, the district court set aside the default judgment in light of a stipulation by the parties that the default be set aside and, "upon entry of the above order, defendant shall accept service of process in this matter and file a responsive pleading within 20 days." On August 7, 1984, defendants moved to dismiss the case on the ground that service was invalid because defendants were not served within 120 days as required by Fed. R. Civ. P. 4(j). It is uncontested that the United States attempted to serve defendants by certified mail pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii) on December 16, 1983 and January 17, 1984, andd that service was received by Shirley Gluklick. Neither defendant responded in any manner to the summons and complaint. Defendants' motion contended that plaintiff's action, in light of the inadequate process, was barred by the statute of limitations. The United States conceded that defendants did not acknowledge service by mail and that no personal service was effected. The United States argued that the case should not be dismissed because (1) the defendants failed to acknowledge service; (2) the government believed in good faith that it had effected proper service; (3) defendants had agreed to acknowledge service in return for setting aside the default; and (4) the district court could enlarge the period of time for service pursuant to Fed. R. Civ. P. 6(b)(2).

On November 2, 1984, the district court denied the motion to dismiss.

> It should be noted that Rule 4, particularly Section J, subparagraph J, is not self-executing. It provides that if the provisions of mail, failure to acknowledge and personal service are not met, that the Court, on its own motion, the Court may *sua sponte* upon notice or upon motion shall dismiss the case. I take that to mean that the case

> was still tryable, since no order of dismissal had been entered, and thereafter in this case the parties entered into a stipulation under which the defendants agreed to accept service. Under those circumstances, I don't believe that the Rule has been violated. There not having been any dismissal and the defendants having agreed to accept service, in my opinion they can't be heard at this time saying that under the Rule that that matter should have been dismissed at some other time. If they had come in at the time they received the Notice of Default and moved for dismissal, that would have been another matter. But having agreed to accept service while the case was still alive, viable, I think that they are estopped now from claiming the benefits of the Rule.

On February 20, 1985, defendants answered, denying the allegations of the complaint and alleging improper service and the statute of limitations as defenses. On June 25, 1985, the district court granted plaintiff's motion for summary judgment and entered a judgment of $68,000 plus interest and costs in favor of the government.

II.

The issue before us is whether a party may stipulate to accept service which is untimely under the federal rules. Fed. R. Civ. P. 4(c)(2)(C)(ii) provides:

> A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule —
>
> (ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two

> copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. *If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1)* or (d)(3).

(Emphasis added).[3] The courts, consistent with the legislative history,[4] have held that the defendant's failure to acknowledge service renders such service invalid, and requires the plaintiff to personally serve the defendant. *Norlock* v. *City of Garland*, 768 F.2d 654, 657 (5th Cir. 1985); *Shuster* v. *Conley*, 107 F.R.D. 755, 757 (W.D. Pa. 1985); *Stranahan Gear Co.* v. *NL Industries, Inc.*, 102

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[3] Fed. R. Civ. P. 4(d)(1) provides:

> The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

[4] The legislative history provides:

> If the defendant returns the acknowledgment form to the sender within 20 days of mailing, the sender files the return and service is complete. If the acknowledgment is not returned within 20 days of mailing, then service *must* be effected through some other means provided for in the Rules.

128 Cong. Rec. H9848 (December 15, 1982) (statement of Rep. Edwards), *reprinted in* 1982 U.S. Code Cong. & Ad. News 4440 (emphasis added).

F.R.D. 250, 251-52 (E.D. Pa. 1984); *Eden Foods, Inc.* v. *Eden's Own Products, Inc.*, 101 F.R.D. 96 (E.D. Mich. 1984). *But see Morse* v. *Elmira Country Club*, 752 F.2d 35, 39 (2d Cir. 1984). In this case, the government admits that no acknowledgment was returned and no personal service was effected.

Fed. R. Civ P. 4(j) provides in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

The complaint was filed on December 16, 1983, and defendants agreed to accept service in June 1984. Accordingly, it is clear that more than 120 days passed before service was effected.

Defendants argue that at the time they agreed to accept service they were unaware that 120 days had passed since the filing of the complaint, and, that, therefore, service might be defective. Rule 4(j) renders dismissal after 120 days mandatory rather than discretionary in the absence of good cause or a request for extension of time. *Winters* v. *Teledyne Movible Offshore, Inc.*, 776 F.2d 1304, 1305-06 (5th Cir. 1985); *Norlock*, 768 F.2d at 657; *Wei* v. *State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985); *Shuster*, 107 F.R.D. at 757; 128 Cong. Rec. H9848 (December 15, 1982) (statement of Rep. Edwards), *reprinted in* 1982 U.S. Code Cong. & Ad. News 4441 ("the court *must* dismiss the action as to the unserved defendant") (emphasis added). However,

> [a] dismissal for failure to effect service during the 120 days, or for making service improperly if that's the ground, requires a motion. If the motion is made by the defendant, it would of course have to be on notice to the plaintiff. Rule 5(a). If the court is disposed to dismiss sua sponte, which it can do under subdivision (j), the court itself must assure that the plaintiff has notice of its proposed action.

Siegal, *Practice Commentaries on FRCP Rule 4*, C4-35, *reprinted at* 28 U.S.C. Fed. R. Civ. P. 4 at 55 (Supp. 1986). Accordingly, Rule 4(j) does not automatically render service void when, as in this case, it is clear that neither the court nor the defendants moved for dismissal based on inadequate service. *See 2 Moore's Federal Practice*, § 4.46 at 4-575 (1985)("if the 120th day passes and service has not been made, the plaintiff may await a motion or notice of intention to dismiss").

Of course, "[u]nlike subject matter jurisdiction, in personam jurisdiction may be obtained by actions of a party amounting to a waiver, and a court has jurisdiction to enter an order finding a waiver." *English* v. *21st Phoenix Corp.*, 590 F.2d 723, 728 n. 5 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Rauch* v. *Day & Night Mfg. Corp.*, 576 F.2d 697, 699-700 (6th Cir. 1978). Failure to timely assert the defense of insufficient service may constitute a waiver, Fed. R. Civ. P. 12(h)(1), and a stipulation and agreement to settle constitutes a consent to the personal jurisdiction of the court. *Meetings & Expositions, Inc.* v. *Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974). *See Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982); *Petrowski* v. *Hawkeye-Security Insurance Co.*, 350 U.S. 495, 496 (1956). The district court did not err in this case in holding that defendants had agreed to accept service and any defects

therein in return for vacating the default judgment. Any defect in service should have been apparent to defendants in light of Rule 4.

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

JUDGMENT

(United States Court of Appeals for the Sixth Circuit)

(Filed September 18, 1986)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD GLUKLICK, et al., Defendants-Appellants — No. 85-1687)

Before: KEITH and NELSON, Circuit Judges;
and CONTIE, Senior Circuit Judge.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

Issued as Mandate: November 10, 1986
COSTS: NONE

(*Certification Omitted*)

APPENDIX C

OPINION OF COURT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of October 29, 1984)

(UNITED STATES OF AMERICA, Plaintiff, - v - EDWARD GLUKLICK and GLUCK CONSTRUCTION COMPANY, and any successor company, jointly and severally, Defendants — No. 83 CV 5559)

Before the HONORABLE PHILIP PRATT, United States District Judge, at Detroit, Michigan, October 29, 1984.

APPEARANCES: ELLEN CHRISTENSEN, Assistant U. S. Attorney, Appearing on behalf of Plaintiff; STUART A. GOLD, Appearing on behalf of Defendants.

(2) October 29, 1984
Detroit, Michigan

THE COURT: As has been communicated here by counsel, this suit was instituted in December of 1983 and service was made by certified mail upon the defendants subsequently. Subsequently, an amended complaint was filed and service of that complaint was effected by certified mail. However, the defendants here did not respond in accordance with Rule 4 of the Federal Rules of Civil Procedure, which triggered that section of the Rule which requires a plaintiff to effectuate personal service by other means — in this case by the United States Marshall — if an acknowledgment of the mailing is not returned to the United States Attorney.

Subsequently, a default was taken and Notice of Default Judgment was served again by certified mail on the defendants. Shortly thereafter, the defendants contacted the United States Attorney's Office and entered into a stipulation, after some negotiation, which provided that in consideration of the default being set aside, the defendants would accept service. And let me read the pertinent language.

The stipulation, in accordance with (3) which the Court signed the order setting aside the default, reads as follows:

> "The parties, by and through counsel, do hereby agree and stipulate that the default entered by the Clerk on June 4, 1984, at the request of Plaintiff, should be set aside. Upon entry of the above order, defendants shall accept service of process in this matter and file a responsive pleading within 20 days."

That stipulation is in accord with the negotiations reflected in a letter of June 15, 1984, from Miss Christensen to Mr. Greenbaum, the attorney for the defendants, and his response on Juny 25, 1984, to Miss Christensen.

It should be noted that Rule 4, particularly Section J, sub-paragraph J, is not self-executing. It provides that if the provisions of mail, failure to acknowledge and personal service are not met, that the Court, on its own motion, the Court may sua sponte upon notice or upon motion shall dismiss the case. I take that to mean that the case was still tryable, since no order of dismissal had been entered, and thereafter in this case the parties entered into a stipulation under which the defendants agreed to accept service.

Under those circumstances, I don't believe that the Rule has been violated. There not having been (4) any dismissal and the defendants having agreed to accept service, in my opinion they can't be heard at this time

saying that under the Rule that that matter should have been dismissed at some other time. If they had come in at the time they received the Notice of Default and moved for dismissal, that would have been another matter. But having agreed to accept service while the case was still alive, viable, I think that they are estopped now from claiming the benefits of the Rule.

Therefore, that aspect of the motion is denied.

With regard to the issue of the Statute of Limitations, I think that it is quite clear that where a federal question is involved, that the Statute of Limitations is to tolled from the time that the suit is instituted, rather than some other time such as service or putting in the hands of the marshal or any other of the variations that we see throughout the states.

I note, too, that Section 3731, which is the section of the Statute of Limitations that we consider here, the statute reads that, "A civil action under Section 3730 of this Title must be brought within six years from the date of violation committed." I note the term, "must be brought," and not some other term. And I think. "bringing suit" means filing (5) it in the proper court.

So, the motion to dismiss is denied.

MISS CHRISTENSEN: Your Honor, will the Court at this time also consider my request for Rule 11 sanctions and/or costs against the defendants' attorneys, because I believe, as I state in my brief, that the motion was brought in bad faith.

THE COURT: No, I will not entertain that request. I think the Government should make certain it is familiar with the Rules, too.

MISS CHRISTENSEN: Thank you, your Honor.

MR. GOLD: Do I have 20 days to file a responsive pleading?

THE COURT: Yes.

(*Certificaton Omitted*)

APPENDIX D

ORDER SETTING ASIDE DEFAULT UPON STIPULATION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated July 18, 1984)

(UNITED STATES OF AMERICA, Plaintiff, - vs - EDWARD GLUCKLICK, GLUCK CONSTRUCTION COMPANY, Defendant — Civil Action No. 83-CV-5559-DT; HONORABLE PHILIP PRATT)

The court, having reviewed the stipulation hereinbelow, and being otherwise advised in this matter,

IT IS HEREBY ORDERED that the default entered by the clerk on June 4, 1984, for defendant's failure to plead or otherwise defend shall be and hereby is set aside.

/s/ HONORABLE PHILIP PRATT
United States District Judge

Date: July 18, 1984

STIPULATION

The parties, by and through counsel, hereby agree and stipulate that the default entered by the clerk on June 4, 1984, at the request of plaintiff, should be set aside and, upon entry of the above order, defendant

shall accept service of process in this matter and file a responsive pleading within 20 days.

Prepared by:

LEONARD R. GILMAN
United States Attorney

Approved by:

/s/ Jerome B. Greenbaum (*per EC*)
Attorney for Defendant
24901 Northwestern Hwy.
Suite 413A
Southfield, MI 48075

/s/ Ellen Christensen
Assistant U.S. Attorney
817 Federal Bldg.
Detroit, MI 48226

(*Certification Omitted*)

APPENDIX E

ORDER DENYING MOTION TO DISMISS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated November 2, 1984)

(UNITED STATES OF AMERICA, Plaintiff, - vs - EDWARD GLUCKLICK, and GLUCK CONSTRUCTION COMPANY, Defendants — Civil Action No. 83-CV-5559-DT; HONORABLE PHILIP PRATT)

The court, having reviewed the defendants' motion to dismiss, the government's response thereto, and having heard oral argument on October 29, 1984,

For the reasons stated on the record, IT IS HEREBY ORDERED that defendants' motion to dismiss be and hereby is DENIED.

IT IS FURTHER ORDERED that defendants shall have 20 days or until November 19, 1984, to answer plaintiff's complaint.

/s/ HONORABLE PHILIP PRATT
United States District Judge

Date: November 2, 1984

Prepared by:

/s/ Ellen Christensen
Assistant U.S. Attorney, Attorney for Plaintiff
817 Federal Building
Detroit, MI 48226 (313) 226-2163

(Certification Omitted)

APPENDIX F

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals for the Sixth Circuit)

(Filed October 28, 1986)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. EDWARD GLUKLICK, GLUCK CONSTRUCTION COMPANY, Defendants-Appellants — No. 85-1687)

Before: KEITH and NELSON, Circuit Judges;
and CONTIE, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by the defendant-appellants, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

APPENDIX G

28 USC § 1254

"§ 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . "

APPENDIX H

28 USC § 1345

"§ 1345. United States as Plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

APPENDIX I

31 USC §§ 3729, 3730 AND 3731

§ 3729. False claims

A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person —

(1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of public property or money used, or to be used, in an armed force and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, in an armed force and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; or

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from a member of an armed force who lawfully may not sell or pledge the property.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978.)

§ 3730. Civil actions for false claims

(a) The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person. The person may be arrested and bail set for an amount of not more than $2,000 and 2 times the amount of damages sworn to in an affidavit of the Attorney General.

(b)(1) A person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The action shall be brought in the name of the Government. The district courts of the United States shall have jurisdiction of the action. Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs. An action

may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantialy all material evidence and information the person possesses shall be served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. U.S.C.). The Government may proceed with the action by entering an appearance by the 60th day after being notified. The person bringing the action may proceed with the action if the Government —

(A) by the end of the 60-day period does not enter, or gives written notice to the court of intent not to enter, the action; or

(B) does not proceed with the action with reasonable diligence within 6 months after entering an appearance, or within additional time the court allows after notice.

(3) If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

(4) Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

(c)(1) If the Government proceeds with the action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought. The amount may not be more than 10 percent of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

(2) If the Government does not proceed with an action, the person bringing the action or settling the claim may receive an amount the court decides is reasonable for collecting the civil penalty and damages. The amount may not be more than 25 percent of the proceeds of the action or settlement and shall be paid out of those proceeds. The person may also receive an amount for reasonable expenses the court finds to have been necessarily incurred and costs awarded against the defendant.

(d) The Government is not liable for expenses a person incurs in bringing an action under this section.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978.)

§ 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 979.)

APPENDIX J

DECLARATION OF DEFAULT, NON-MILITARY SERVICE AND SUM CERTAIN

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed June 4, 1984)

(UNITED STATES OF AMERICA, Plaintiff, - vs - EDWARD GLUCKLICK, GLUCK CONSTRUCTION COMPANY, Defendant — CIVIL ACTION NO.. 83-CV-5559-DT; HONORABLE PHILIP PRATT)

Ellen Christensen states and declares:

1. I am an Assistant United States Attorney for the Eastern District of Michigan and attorney for plaintiff in this cause.

2. On December 16, 1983 and on January 17, 1984 copies of the summons and complaint were mailed (certified-return receipt requested) to defendant herein. Acknowledgement of same were given to plaintiff by the executed return receipt received by this office on December 19, 1983 and January 19, 1984, being executed by a Shirley Glucklick.

3. More than twenty (20) days have elapsed since the date on which defendant was served and defendant has failed to plead or otherwise defend this action as required by the rules of this Court.

4. Upon information and belief, defendant is not an infant or an incompetent person, nor is defendant in the military service of the United States within the meaning of the Soldiers and Sailors Civil Relief Act of 1940.

5. Plaintiff's claim in this action is for $ 68,000, plus double damages in the above amount, totaling $136,000.00, plus a civil penalty of $2,000.00 along with interests and costs as provided by law. *See* 31 U.S.C. § 3729.

6. That Clerk's Entry of Default and Clerk's Entry of Judgment by Default are therefore proper under Federal Rules of Civil Procedure 55(a) and 55(b)(1), respectively.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1 day of June, 1984

/s/ ELLEN CHRISTENSEN
Assistant United States Attorney